Supreme Court, U.S.
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No. 06-221 AUG 10 2006
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In The
Supreme Court of the United States

VALERI BARNES,

Petitioner,

v.

THE STATE OF COLORADO,

Respondent.

On Petition For A Writ of Certiorari To The Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Thirteenth Amendment to the United States Constitution prohibiting involuntary servitude violated when a state court engrafts an exception to the plain wording of the Amendment, allegedly pursuant to its "inherent powers," to compel petitioner, a former court reporter, to continue producing transcripts against her will two years after her resignation as a state employee under penalty of jail by remedial contempt if she refuses?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

FACTS MATERIAL TO THE QUESTION PRESENTED 3

REASONS FOR GRANTING THE WRIT 6

THE CONSTITUTIONAL PROHIBITION OF INVOLUNTARY SERVITUDE DOES NOT MAKE EXCEPTIONS FOR COURT EMPLOYEES WHO PERFORM IMPORTANT FUNCTIONS FOR THE COURT 6

A. COMPELLING MS. BARNES TO PRODUCE TRANSCRIPTS OVER TWO YEARS AFTER THE TERMINATION OF HER EMPLOYMENT CONSTITUTES "INVOLUNTARY SERVITUDE" AND VIOLATES THE THIRTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION 6

B. THE COLORADO COURT OF APPEALS HAS ESSENTIALLY DISREGARDED THE FACT THAT PETITIONER HAS NO ABILITY TO OPT-OUT OF HER SERVITUDE, WHICH IS A CRITICAL FACTOR CONSIDERED BY ALL OTHER COURTS TO HAVE ADDRESSED THE ISSUE 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases

Bailey v. Alabama, 219 U.S. 219 (1911) 5

Beltran v. Cohen, 303 F. Supp. 889 (N.D. Cal. 1969) 5

Family Division of Trial Lawyers v. D.C. Superior Court, 725 F.2d 695 (D.C. App. 1984) 6

Hodges v. United States, 203 U.S. 1 (1906) 5

Pinellas County Classroom Teachers Ass'n v. Board of Public Instruction, 214 So.2d 34 (Fla. 1968) 6

School District for the City of Holland v. Holland Education Ass'n, 157 N.W.2d 206 (Mich. 1968) 6

Steirer v. Bethlehem Area School District, et. al., 789 F. Supp. 1337 (E.D. Penn. 1992) 6

United States v. Kozminski, 487 U.S. 931 (1988) 5

Williamson v. Vardeman, 674 F.2d 1211 (8th Cir. 1982) 6

Other Authorities

28 U.S.C. §1257 1

United States Constitution, Amendment XIII 1, 3, 5, 7

OPINION BELOW

The opinion of the Colorado Court of Appeals is attached as an Appendix, as is the denial of a Petition for a Writ of Certiorari by the Colorado Supreme Court.

JURISDICTION

On December 1, 2005, the Colorado Court of Appeals affirmed the trial court's determination of remedial contempt and incarceration for Petitioner's refusal to produce transcripts for the court years after she had ceased her employment with the State of Colorado. Ms. Barnes filed a timely Petition for a Writ of Certiorari, which was denied by the Colorado Supreme Court on May 16, 2006. Copies of the written decisions from the Colorado Courts are attached as Appendix A (Colorado Court of Appeals opinion) and Appendix B (Colorado Supreme Court's denial of Petition for Writ of Certiorari). Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The issues raised in this petition implicate the Thirteenth Amendment to the United States Constitution. The relevant portions of these provisions are as follow:

Amendment XIII

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

STATEMENT OF THE CASE

FACTS MATERIAL TO THE QUESTIONS PRESENTED

Valeri Barnes was employed as a court reporter with the Arapahoe County, Colorado, District Court from 1991 through March 15, 2002. (v. 8, pps. 160 - 161)[1]. Throughout that period, Ms. Barnes was an at-will employee and no employment or other contract existed between herself and her employer. Toward the end of her employment with the Arapahoe County District Court, Ms. Barnes was the court reporter assigned to record proceedings, in whole or in part, in *People v. Firethunder*, 01-CR-552; *People v. Oplinger*, 01-CR-464; *People v. Tumentsereg*, 01-CR-220; *People v. Whittiker*, 00-CR-2822; *People v. Carmichael*, 01-CR-280; *People v. McGlotten*, 00-CR-2666; and *People v. McNurlen*, 01-CR-80. (v. 8, pps. 19 - 20). Notices of appeal were filed for these cases, and trial transcripts were designated as part of the records on appeal.[2]

On March 15, 2002, Ms. Barnes resigned her employment with Arapahoe County and began work as a courtroom deputy for the United States District Court for the District of Colorado.[3] (v. 8, pps. 161 - 164). Ms. Barnes did, however, agree to help with the preparation of the trial transcripts in the above-cited criminal cases, and to that end took possession of her notes to read through and transcribe. (v. 8, p. 173). Ms. Barnes continued to produce transcripts as she was able, taking into consideration her full-time duties with the federal court. (v. 8, pps.172 - 173).

On September 9, 2002, Ms. Barnes was diagnosed with invasive breast cancer, and she was treated with bilateral mastectomy on October 9, 2002. (v. 8, p. 166). She continues to undergo treatment, including adjuvant chemotherapy. (v. 8, p. 68). Ms. Barnes' treatment is slow, painful, and has also been complicated by recurrent episodes of pancreatitis. (v. 8, p. 69). As a result of her illness and associated treatment, Ms. Barnes suffers from cognitive dysfunction, memory impairment, short-term memory loss, fatigue, headaches, depression, stress and anxiety. (v. 8, pps. 70 -71). Treatment for

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[1] All references are to the record lodged in the court below.

[2] See *People v. Firethunder*, 02-CA-1829; *People v. Oplinger*, 02-CA-1403; *People v. Tumentsereg*, 02-CA-1563; *People v. Whittiker*, 01-CA-2340; *People v. Carmichael*, 02-CA-0719; *People v. McGlotten*, 02-CA-1014; *People v. McNurlen*, 02-CA-1371.

[3] As of the date of this Petition, Ms. Barnes remains an employee of the federal government.

Ms. Barnes' cognitive problems has only been moderately successful, and she continues to have significant difficulty with short-term memory loss. (v. 8, p. 72). The contempt proceedings before the Arapahoe County District Court are in part responsible for some of the emotional problems such as stress, depression, and anxiety. Nevertheless, Ms. Barnes' illness, in concert with the physical and cognitive problems associated with it and its treatment, rendered her unable to perform the duties of a court reporter. (v. 8, p. 73).

Recognizing the limitations of her diminished physical and mental state, Ms. Barnes contacted Joyce Martin, a court reporter for Arapahoe County, in January 2003 and advised her that she would be unable to complete the requested transcripts. (v. 8, pps. 173 - 174). At that time, Ms. Barnes also turned over her stenographic notes, appeal notices, and partial transcripts that she had completed in several cases. Id. Ms. Barnes' notes were then given to note readers so that transcripts could be produced. (v. 8, p. 17). However, the note readers were unable to produce transcripts from the notes, allegedly because of Ms. Barnes' "unique style of writing." (v. 8, p. 37). Ms. Martin then concluded that, if the transcripts were ever to be completed, Ms. Barnes would be the one that needed to complete them. (v. 8, p. 37).

In the summer or fall of 2003, ten appellants whose cases were on appeal but whose trial records had not been completed or transmitted to the Court of Appeals filed motions seeking to vacate the convictions based upon alleged violations of the appellants' due process rights to timely appeals. (v. 8, p. 20). Among those ten cases were *People v. Firethunder*, *People v. Oplinger*, *People v. Tumentsereg*, *People v. Whittiker*, *People v. Carmichael*, *People v. McGlotten*, and *People v. McNurlen*. (v. 8, pps. 19 - 20). On September 15, 2003, the Colorado Court of Appeals entered an order remanding those ten cases to the trial court and granted it jurisdiction to consider the motions to vacate and address motions related to record problems. The Court of Appeals also requested "that the district court set a schedule for completion of the records and to determine what action, if any, should be taken concerning the reporter's failure to comply with [the Court of Appeal's] deadlines and to complete the transcript in a timely manner."

In response to the Court of Appeal's order, the district court held several status conferences and hearings on the matter. The first hearing took place January 9, 2004, and a second on February 20, 2004. Ms. Barnes was subpoenaed for and present at both hearings. With respect to the February 20, 2004 hearing, the Arapahoe County District Attorney's Office issued a Sub-

poena *duces tecum* to Ms. Barnes compelling her attendance at that hearing and ordering her to produce her reporter notes, drafts of transcripts, partial transcripts, and completed transcripts prepared from the notes, or any discs or other information in five cases on appeal. Again, Ms. Barnes had already turned over her notes and completed transcripts, and she had not been employed by Arapahoe County for nearly two years. Nevertheless, at the conclusion of the February 20, 2004 hearing, the court below ordered Ms. Barnes to prepare transcripts in three cases. The court below then set another hearing date at which to determine whether Ms. Barnes had "made good faith efforts to complete the same." As a result of her diminished physical and mental capacity, detailed above; Ms. Barnes was unable to complete the transcripts as ordered. (v. 8, p. 186).

Yet another hearing was held on August 31, 2004. (v. 5). In anticipation of that hearing, Ms. Barnes filed a Motion to Vacate the February 20, 2004 Order, arguing that such order violated the Thirteenth Amendment of the United States Constitution and Article II, § 26 of the Colorado Constitution. (v. 5, pps. 290 – 295). That motion was denied, and the trial court issued an order stating that outside reporters had been hired to prepare the transcripts and that the transcripts should be completed on or before October 18, 2004. (v. 5, pps. 288 – 289; 307 - 308). The matter was then set for another hearing on October 18, 2004. Prior to that hearing, the Arapahoe County District Attorney's Office filed a motion asking that the district court find Ms. Barnes in contempt of court and impose remedial sanctions, i.e., incarceration, until the transcripts were completed.

Ms. Barnes remained unable to complete the transcripts before the October 18, 2004 deadline, and a contempt hearing was held on November 9, 2004. (v. 8). At that hearing, Arapahoe County Court reporters Joyce Martin and Kim Arnold testified about their contacts with Ms. Barnes and their efforts to produce the transcripts. (v. 8, pps. 11 – 61; 85 - 89). Ms. Barnes testified about her illness and treatment and their various debilitating effects upon her ability to function. (v. 8, pps. 160 - 198). Ms. Barnes' testimony was buttressed by two of her treatment providers, Dr. Kevin J. Boyle, MD, and Cynthia R. Regardie, Psy.D. (v. 8, pps. 62 – 85; 105 – 141). Dr. Boyle testified that, due to her medical condition, she was physically incapable of completing the duties required of a court reporter. (v. 8, p. 73). Dr. Regardie testified that Ms. Barnes was losing memory including blocks of time and struggling to remember simple things. (v. 8, p. 117). Furthermore, Dr. Regardie testified that the ongoing judicial proceedings against her were causing intense stress, anxiety, fear, nightmares, fatigue, and headaches. (v. 8, p.

118). Such symptoms of distress were particularly worrisome, Dr. Regardie stated, because it was important for Ms. Barnes to maintain a healthy immune system at this stage of her recovery. (v. 8, p. 128). The testimony of Ms. Barnes, as well as that of her treatment providers, was uncontroverted. (v.8). Nevertheless, the court below found Ms. Barnes to have a present duty to provide the transcripts and that she willfully disobeyed a lawful court order. (v. 8, pps. 223 - 224). It then found her in contempt and ordered incarceration in the Arapahoe County Jail as a remedial sanction, the imposition of which was stayed until January 11, 2005. (v. 8, p. 226). The court below ordered that the contempt could be purged upon 1) completion of the *Carmichael, McGlotten, Firethunder*, and *Whittiker* transcripts; and 2) provided that Ms. Barnes assists in the preparation of the *Oplinger* and *Tumentsereg* transcripts. (v. 8, pps. 224 - 225).

On January 11, 2005, the court below again stayed Ms. Barnes' incarceration pending appellate review by the Court of Appeals.

On December 1, 2005, the Colorado Court of Appeals published an opinion affirming the trial court's finding of contempt, reasoning that the "inherent powers of the court" gave it the authority to compel Ms. Barnes to involuntarily toil for the greater societal good and produce transcripts for the State of Colorado.

On May 16, 2006, the Colorado Supreme Court, by a four to two vote (one justice did not participate), denied a Petition for a Writ of Certiorari raising the issue raised in this Petition.

REASONS FOR GRANTING THE WRIT

THE CONSTITUTIONAL PROHIBITION AGAINST INVOLUNTARY SERVITUDE DOES NOT MAKE EXCEPTIONS FOR COURT EMPLOYEES WHO PERFORM IMPORTANT FUNCTIONS FOR THE COURT.

The court below has engrafted an exception into the Thirteenth Amendment's prohibition against involuntary servitude. The exception is that involuntary servitude is constitutionally prohibited *unless* the person the court compels to work is *really important* to the court. As society becomes more complex in many ways, this Court should act to define the limits upon a government's ability to force a citizen to work against his or her will. Indeed, the text of the Thirteenth Amendment to the United States Constitution makes no exception to the prohibition against involuntary servitude simply because it is the business of a court which suffers when a former employee refuses to continue to work. This Court should stop the erosion of the Constitution by the Colorado courts and define the limits and contours of the Thirteenth Amendment as it applies in a modern society.

A. COMPELLING MS. BARNES TO PRODUCE TRANSCRIPTS OVER TWO YEARS AFTER THE TERMINATION OF HER EMPLOYMENT CONSTITUTES "INVOLUNTARY SERVITUDE" AND VIOLATES THE THIRTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

This Court has defined involuntary servitude as "a condition of enforced compulsory service of one to another." *Hodges v. United States*, 203 U.S. 1, 16 (1906). Courts have subsequently qualified the condition as one in which "the worker must labor against his will for the benefit of another," without the option to refuse the work. *Beltran v. Cohen*, 303 F. Supp. 889 (N.D. Cal. 1969); *Bailey v. Alabama*, 219 U.S. 219 (1911); *United States v. Kozminski*, 487 U.S. 931 (1988).[4]

Kozminski clearly established that legal coercion constitutes compulsion for the purposes of finding involuntary servitude. *Id.* Though *Kozminski* dealt with the interpretation of a criminal slavery statute, its interpretation

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[4] It is instructive to note that no case considers relevant whether the forced labor is compensated or not.

of "compulsion" is correct and the case has been cited in numerous civil cases.

With the exception of inmate labor, which appears to be expressly permitted by the language of the Thirteenth Amendment, recent case law addressing the "slavery" and "involuntary servitude" provisions of that Amendment generally falls into one of three categories: 1) confinement for failure to pay child support, 2) appointment of attorneys to represent indigent clients *pro bono* (*See e.g., Family Division of Trial Lawyers v. D.C. Superior Court*, 725 F.2d 695 (D.C. App. 1984); *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982)); and 3) requiring uncompensated community service in schools and other institutions (*See e.g., Steirer v. Bethlehem Area School District*, et. al., 789 F. Supp. 1337 (E.D. Penn. 1992)).

In *Steirer*, the court held constitutional a school district's imposition of mandatory community service upon its students as a prerequisite to graduation. The decision was founded upon two premises: First, the court found that "there is no dispute that the community service program serves educational purposes" and therefore served the benefit of the students and not another. *Steirer*, 789 F. Supp. 1337 at 1345. Of more critical importance however, the court also found that the students could opt-out of the requirement by attending a private school, withdrawing from school and pursuing an education at home, or remain in school and receive a high school equivalency diploma. *See Steirer*, 789 F. Supp. 1337 at 1343. The servitude had an escape clause built into it, therefore it was not compelled.

The ability to "opt out" of the labor requirement is central to the Thirteenth Amendment analysis. "An attorney who wishes to take no further assignments is free to either stop practicing before the Family Division, or even to continue to practice without taking CJA-compensated juvenile cases. Inability to avoid continued service is the essential ingredient of involuntary servitude." *Family Division of Trial Lawyers*, 725 F.2d 695 at 705. As is cited above, the same principle holds true in the community service context. "[The students'] implicit ability to choose whether to participate in the community service program, removes the program from the Thirteenth Amendment's reaches." *Steirer*, 789 F. Supp. 1337 at 1344, n.6.

The same reasoning has been employed in the various cases addressing state employees' right to strike, and attacks based on an alleged violation of the constitutional prohibition against involuntary servitude are usually rejected on the ground that since public employees can always resign their

employment, they therefore cannot be said to be compelled by the antistrike rule to labor against their will. *See Pinellas County Classroom Teachers Ass'n v. Board of Public Instruction*, 214 So.2d 34 (Fla. 1968) ("Even more importantly, perhaps, the appellants were told that they could resign or breach their contracts, but they could not strike and bargain for a return to work while retaining their teacher status under contract terms. This is a significant aspect of the instant matter which should be carefully noted in employing this opinion in any future situation."); *School District for the City of Holland v. Holland Education Ass'n*, 157 N.W.2d 206 (Mich. 1968).

In its motion seeking a contempt finding against Ms. Barnes, the state argued that if the district court "does not take stern action, every reporter in this state will know it. Any reporter in the state will know they can merely quit their job, refuse to complete their transcripts, and receive no consequence." Indeed, that is precisely what every court reporter, or citizen in a free country should know. All they need do to leave their employment is simply 'up and quit,' absent contractual or statutory authority to the contrary. In fact, it is the converse of this argument that defines the real problem - how many people will be willing to accept jobs as court reporters knowing that they will never be permitted to quit and that a court may compel them to labor against their will for an undetermined and possibly unlimited length if time? In the United States, all are, and should remain, free to quit.

The order compelling Ms. Barnes to provide additional transcription does not in any way inure to her benefit, particularly in light of her present medical, personal, and professional circumstances. Furthermore, because the order legally compels her personally to provide the transcripts, she cannot "opt out" of the labor requirement. Thus, producing transcripts does not fall under *Streirer* and there is no case law to uphold the order requiring her to do so. Court reporting is not a servitude which is excepted from the prohibitions of the Thirteenth Amendment. The trial court, by way of the entry of the November 9, 2004 order, has employed illegal coercion to compel Ms. Barnes to produce transcripts. Because she faces sanctions, i.e., incarceration, should she not comply with the order, Ms. Barnes is being compelled to labor against her will for the benefit of the state. The order thus imposes a condition of involuntary servitude and violates the Thirteenth Amendment of the United States Constitution.

B. THE COLORADO COURT OF APPEALS HAS ESSENTIALLY DISREGARDED THE FACT THAT PETITIONER HAS NO ABILITY TO OPT-OUT OF HER SERVITUDE,

WHICH IS A CRITICAL FACTOR CONSIDERED BY ALL OTHER COURTS TO HAVE ADDRESSED THE ISSUE.

The Colorado Court of Appeals decision is also at odds with every other cited case defining the contours of the Thirteenth Amendment. In each of the other cases, the one consideration which caused courts to hold that there was no Thirteenth Amendment violation was that in each instance the 'enslaved' party had some way to opt-out of 'slavery.' Valeri Barnes has no ability to opt-out of this order. When confronted with this fact, the Colorado Court of Appeals simply labeled that as "simply one fact which the courts must consider..." (Attached opinion, p. 7). This Court should clarify this conflict between the lower courts regarding how to measure whether the Thirteenth Amendment has been violated.

CONCLUSION

This Court should grant certiorari, and vacate the judgment of the court below.

Respectfully submitted,

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COLORADO COURT OF APPEALS

Court of Appeals No.: 04CA2636
Arapahoe County District Court Nos. 00CR2666, 00CR2822, 01CR80, 01CR220, 01CR280, 01CR464 & 01CR552
Honorable Anthony F. Vollack, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Hassan McGlotten, Hausua Aju Whittiker, James L. McNurlen, Darkhanbayar Tumentsereg, Richard Scott Carmichael, Clevia Maria Firethunder, and James Elwood Oplinger,

Defendants,

and Concerning Valeri Barnes,

Contemnor-Appellant.

ORDER AFFIRMED
Division IV
Opinion by JUDGE RUSSEL
Loeb and Metzger*, JJ., concur
Announced: December 1, 2005

Carol Chambers, District Attorney, Paul R. Wolff, Deputy District Attorney, Centennial, Colorado, for Plaintiff-Appellee

Killmer, Lane & Newman, LLP, Darold W. Killmer, David A. Lane, Denver, Colorado, for Contemnor-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2005.

Valeri Barnes appeals the trial court's order holding her in contempt of court. We affirm.

Barnes worked as a court reporter for the Arapahoe County District Court. During her employment, she was assigned to record proceedings involving the following criminal defendants: (1) Hassan McGlotten, 00CR2666; (2) Hausua Aju Whittiker, 00CR2822; (3) James L. McNurlen, 01CR80; (4) Darkhanbayar Tumentsereg, 01CR220; (5) Richard Scott Carmichael, 01CR280; (6) Clevia Maria Firethunder, 01CR464; and (7) James Elwood Oplinger, 01CR552. Transcripts of these proceedings are necessary for appellate review.

In March 2002, Barnes left her job and went to work for the federal courts. Although Barnes agreed to complete the necessary state court transcripts, her efforts were interrupted: she was diagnosed with cancer, underwent surgery and chemotherapy, and did not work for several months. Barnes continues to suffer lingering effects of her illness and treatment.

In early 2003, Barnes returned her notes to the state district court so that other court reporters could complete the necessary transcripts. This proved unsuccessful: Barnes's notes are idiosyncratic, and the reporters could not complete the transcripts without her assistance.

In late 2003, several criminal defendants -- including those named above -- filed motions in this court, seeking to vacate their convictions. These defendants argued that the lack of transcripts was depriving them of their right to a timely appeal.

In February 2004, the district court ordered Barnes to dictate her notes into a tape recorder so that another court reporter could complete the transcripts. Barnes failed to do so. The court then hired a reporter who prepared draft transcripts and gave them to Barnes for corrections. Barnes assisted this reporter through August 2004 but then announced that she would no longer cooperate.

The People then filed a motion to hold Barnes in contempt of court.

In November 2004, the court heard evidence on the People's motion. The court found that Barnes had the duty and ability to assist in completing the transcripts. It found that Barnes had failed to comply with the court's orders and imposed a remedial contempt sanction: it ordered that Barnes be jailed until she assists in preparing the transcripts.

The court stayed the sanction pending this appeal.

I.

Barnes first contends that the trial court lacked authority to order her to assist in preparing the transcripts because she no longer works for the state system. We disagree. Courts have inherent authority to issue orders that are necessary for the performance of judicial functions. Halaby, McCrea

& Cross v. Hoffman, 831 P.2d 902, 907 (Colo. 1992); Pena v. Dist. Court, 681 P.2d 953, 956 (Colo. 1984). This inherent authority extends beyond the power to control litigants, lawyers, and court personnel. The court may order other individuals to support or participate in judicial proceedings. See, e.g., Eykelboom v. People, 71 Colo. 318, 206 P. 388 (1922) (court has inherent power to issue a subpoena for records; that power is not limited to the parties); Bd. of County Comm'rs v. Lee, 3 Colo. App. 177, 180, 32 P. 841, 842 (1893) (court may order any citizen to "attend in obedience to process, and to testify as to what he may know"); see also In re Court Facilities ex rel. Bd. of County Comm'rs, 107 P.3d 981, 984 (Colo. App. 2004) (court has inherent authority to order county commissioners to provide a new court facility).

As part of its inherent authority, the court has the power to enforce obedience to its orders though contempt sanctions. Kourlis v. Port, 18 P.3d 770, 773 (Colo. App. 2000). The court's power to remedy contempt includes the ability to punish those who are not currently parties or officers of the court. In re Lopez, 109 P.3d 1021, 1023 (Colo. App. 2004).

We conclude that Barnes did not escape the court's inherent authority when she left her job in the state court system. Barnes has effectively placed herself in the position of a witness whose services are essential to ensure fair judicial proceedings. Because Barnes is the only person who can read her notes, she alone can provide the "evidence" necessary to enable appellate review of the pertinent criminal cases. Cf. In re Alt v. Cline, 589 N.W.2d 21, 26-27 (Wis. 1999) (unwilling expert can be required to testify if party demonstrates compelling necessity).

II.

Barnes next contends that, if the contempt sanction stands, she will be subjected to involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution and article II, § 26 of the Colorado Constitution. We disagree.

The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Article II, § 26 of the Colorado Constitution provides: "There shall never be in this state either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted." The primary purpose of both provisions is to outlaw slavery. United States v. Kozminski, 487 U.S. 931, 942, 108 S.Ct. 2751, 2759, 101 L.Ed.2d 788 (1988); In re Marriage of Franks, 189 Colo. 499, 508, 542 P.2d 845, 851 (1975).

The "prohibition against involuntary servitude does not prevent the

State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties." United States v. Kozminski, supra, 487 U.S. at 943-44, 108 S.Ct. at 2760. Thus, for example, governments may compel military service or other public work without violating the Thirteenth Amendment. See Selective Draft Law Cases, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918) (military service); Butler v. Perry, 240 U.S. 328, 36 S.Ct. 258, 60 L.Ed. 672 (1916) (work on public roads and bridges).

Judicial proceedings fall within the scope of civic interests that the public is required to support. In Hurtado v. United States, 410 U.S. 578, 93 S.Ct. 1157, 35 L.Ed.2d 508 (1973), the Court addressed a challenge to a statute that allowed the government to incarcerate material witnesses to secure their testimony. The witnesses complained that the statutory rate of pay -- $20 for each day of attendance, plus $1 for each day of incarceration -- violated their rights under the Fifth and Thirteenth Amendments. In rejecting these challenges, the Court noted that the "public obligation to provide evidence . . . persists no matter how financially burdensome it may be." Hurtado v. United States, supra, 410 U.S. at 589 & n.11, 93 S.Ct. at 1164. The witnesses' sacrifice, wrote the Court, "is a part of the necessary contribution of the individual to the welfare of the public." Hurtado v. United States, supra, 410 U.S. at 589, 93 S.Ct. at 1164 (quoting Blair v. United States, 250 U.S. 273, 281, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919)).

Here, Barnes's obligation to provide transcripts is a necessary contribution to the welfare of the public. Her service is required because she alone can read her notes and because courtroom transcripts are "indispensable to the administration of justice." Jones v. Dist. Court, 780 P.2d 526, 528 (Colo. 1989); see also People v. Killpack, 793 P.2d 642, 643 (Colo. App. 1990) (if a criminal defendant is prejudiced by an incomplete appellate record, his conviction must be reversed).

Relying on Family Division Trial Lawyers of Superior Court- D.C., Inc. v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984), and Steirer v. Bethlehem Area School District, 789 F. Supp. 1337, 1343 (E.D. Pa. 1992), aff'd, 987 F.2d 989 (3d Cir. 1993), Barnes nevertheless argues that the court's order violates the Thirteenth Amendment because it contains no escape clause or opt-out provision. We reject this argument.

In evaluating a claim under the Thirteenth Amendment, courts attach great significance to the fact that an individual may avoid the required service. But the ability to opt out is not an indispensable condition for compliance with the Thirteenth Amendment. It is simply one fact that courts must consider. See, e.g., Steirer v. Bethlehem Area Sch. Dist., supra, 789

F. Supp. at 81344-46 (permissible to require students to perform community service because it serves educational purposes and the interest of the public). Here, an opt-out provision is neither required nor possible because other court reporters cannot read Barnes's notes.

Although it is not essential to our analysis, we note that Barnes will be compensated at a reasonable rate for her services. And we note that, by assisting in the preparation of the transcripts, Barnes could limit the liability that she might otherwise face in a potential civil suit. See Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993) (court reporter does not have absolute immunity from liability for delay in preparing transcript of a criminal trial); State ex rel. Philyaw v. Williams, 438 S.E.2d 64, 67 (W. Va. 1993) (court reporters are potentially liable to those who are harmed by the failure to prepare transcripts promptly).

III.

Finally, Barnes contends that the trial court abused its discretion in imposing remedial contempt sanctions against her. We disagree.

The exercise of contempt powers is discretionary, and sanctions will not be reversed unless the contemnor shows that the court abused its discretion. In re Estate of Elliott, 993 P.2d 474, 478 (Colo. 2000); In re Marriage of Roberts, 757 P.2d 1108, 1110 (Colo. App. 1988). A court must, however, exercise its contempt powers with caution and self-restraint. In re Estate of Elliott, supra, 993 P.2d at 478.

We perceive no serious question that court reporters may be held in contempt for failing to produce transcripts in a timely manner. This sanction has been employed in other jurisdictions. See, e.g., United States v. Luciano-Mosquera, 63 F.3d 1142, 1158 n.8 (1st Cir. 1995); In re Peasley, 545 N.E.2d 792 (Ill. App. Ct. 1989); In re Hatfield, 607 N.E.2d 384 (Ind. 1993); In re Conner, 722 S.W.2d 888 (Ky. 1987); In re Hanks, 606 P.2d 1151 (Or. Ct. App. 1980), aff'd, 623 P.2d 623 (Or. 1981); Johnson v. State, 151 S.W.3d 193, 195-96 (Tex. Crim. App. 2004).

The use of contempt sanctions may be particularly appropriate in criminal cases. If criminal defendants do not receive timely direct appeals, they may bring due process claims against the state. Such claims require courts to consider, among other things, the extent to which the state is at fault. See Harris v. Champion, 15 F.3d 1538, 1559-67 (10th Cir. 1994). Because court reporters are considered officers of the court, their failures are attributable to the state. Cameron v. LeFevre, 887 F. Supp. 425, 432 (E.D.N.Y. 1995); see also State v. Harper, 675 A.2d 495, 498 (Me. 1996); In re Williams, 393 N.E.2d 353, 355 (Mass. 1979). Thus, a court may employ contempt sanctions against a court reporter in an effort to discharge

the state's responsibility to provide due process. See Cameron v. LeFevre, supra (use of contempt sanction cited as evidence of reasonable diligence).

Barnes argues that the court's order was inappropriate because the evidence established that she was unable, and not merely unwilling, to assist in producing the transcripts. We conclude that the record supports the trial court's findings.

Before imposing remedial contempt sanctions, a trial court must find that the contemnor has the present ability to perform the acts required to purge the contempt. C.R.C.P. 107(d)(2); In re Estate of Elliott, supra, 993 P.2d at 479. The contemnor has the burden of proving the inability to perform the acts required. In re Estate of Elliott, supra.We accept the court's factual findings unless they are so clearly erroneous as to find no support in the record. People in Interest of S.G., 91 P.3d 443, 452 (Colo. App. 2004).

Here, the trial court found that Barnes had the present ability to assist in the preparation of the transcripts. The record supports these findings, for it shows that Barnes (1) was able to assist in completing transcripts before refusing to cooperate further, and (2) is able to perform her full-time job in federal court.

Barnes produced evidence that, if credited, would have supported a finding that she lacks the ability to purge the contempt. This evidence included the testimony of a medical expert who opined that Barnes suffered cognitive dysfunction as a result of her chemotherapy. But the court discounted the credibility of this evidence because it was based on information supplied by Barnes and because the expert was surprised to learn that Barnes was employed full time. As the trier of fact, the court was free to reject this and other expert testimony, and we are bound by its findings. See Tiger v. Anderson, 976 P.2d 308, 310-11 (Colo. App. 1998).

We therefore find no abuse of discretion.

The order is affirmed.

JUDGE LOEB and JUDGE METZGER concur.

SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

CERTIORARI TO THE COURT OF APPEALS, 04CA2636
DISTRICT COURT, ARAPAHOE COUNTY,
00CR2666, 00CR2822, 01CR80, 01CR220, 01CR464, & 01CR552

CASE NO. 06SC034

Petitioner:

VALERI BARNES,

V.

Respondent:

THE PEOPLE OF THE STATE OF COLORADO

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 15, 2006.
JUSTICE EID does not participate.

JUSTICE MARTINEZ and JUSTICE BENDER would grant as to the following issue:

Whether a trial court order compelling petitioner, a former court reporter, to continue producing transcripts two years after her resignation as a state employee constitutes "involuntary servitude" in violation of the Thirteenth Amendment of the United States Constitution and Article II, Section 26 of the Colorado Constitution.

Copies mailed via the State's Mail Services Division on 05/15/06. MLK

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Clerk of the Court
Colorado Court of Appeals